Supreme Court, U.S.
FILED
JAN 20 2004
OFFICE OF THE CLERK

No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

SCOTT P. COOPER*
CHARLES S. SIMS
JONATHAN E. RICH
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
(310) 557-2900

* *Counsel of Record*

Attorneys for Petitioners

185299

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTRODUCTION 1

I. ALTMANN'S REASONS FOR DEPARTING FROM *LANDGRAF* ARE UNPRECEDENTED AND ILL-CONCEIVED. 1

1. Altmann's basis for asserting that the FSIA should be presumed to apply retrospectively has been rejected by this Court. 1

2. The FSIA is not a forum-allocating statute, as Altmann asserts. 3

II. ALTMANN'S RESPONSE DISTORTS THE TEXT AND PURPOSE OF THE FSIA. 6

1. Altmann's interpretation of the FSIA's preamble does not satisfy *Landgraf*'s clear-statement requirement. 6

2. The FSIA regulates post-enactment expropriations by foreign states, not their current possession of property previously expropriated. 7

3. The holding in *Dole Food v. Patrickson* is not relevant to the question before this Court. 12

Contents

	Page
III. AUSTRIA HAS NOT WAIVED ITS SOVEREIGN IMMUNITY IN THE UNITED STATES BY ITS COMMITMENTS TO RESTITUTION.	13
1. Austria's restitution statutes provide no basis to assert jurisdiction in the United States.	13
2. Austria did not waive its sovereign immunity in the United States by entering into treaties, international agreements or conventions.	15
3. Altmann's attempt to belittle the foreign policy implications of this case are unpersuasive.	17
CONCLUSION	19
APPENDIX — Excerpt of Annex A to Joint Statement between the Governments of the Republic of Austria and the United States, dated January 17, 2001	1a

TABLE OF CITED AUTHORITIES

	Page
Federal Cases	
Abrams v. Société Nationale Des Chemins De Fer Français, 332 F.3d 173 (2d Cir. 2003)	5, 7, 12, 13
Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976)	2, 3
American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921)	6
Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978)	5
Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)	8, 9, 15
Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926)	2
Branch v. Smith, 538 U.S. 254, 123 S. Ct. 1429 (2003)	8
Califano v. Sanders, 430 U.S. 99 (1977)	5
Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)	11

Cited Authorities

	Page
Columbia Marine Services, Inc. v. Reffet, Ltd., 861 F.2d 18 (2d Cir. 1988)	17
Commissioner v. Keystone Consol. Indus., 508 U.S. 152 (1993)	10
Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938)	2
Corzo v. Banco Central De Reserva Del Peru, 243 F.3d 519 (9th Cir. 2001)	4
Dole Food Co. v. Patrickson, __ U.S. __, 123 S. Ct. 1655 (2003)	12, 13
Dralle v. Republic of Czechoslovakia, 17 Int'l L. Rep. 155 (1950)	14
First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)	17
Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995)	4, 13
Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993)	1, 2
Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170 (5th Cir. 1989).	13

Cited Authorities

	Page
Hughes Aircraft Co. v. United States ex rel Schumer, 520 U.S. 939 (1997)	3, 4, 5
Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003)	5, 7
Jackson v. People's Republic of China, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987)	7
Landgraf v. USI Film Products, Inc., 511 U.S. 244 (1994)	*passim*
Lindh v. Murphy, 521 U.S. 320 (1997)	6, 8
National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)	2, 15
Oetjen v. Central Leather Co., 246 U.S. 297 (1918)	15
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984)	4
Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989)	11
Ralpho v. Bell, 569 F.2d 607 (1977)	5

Page

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 2

Ex Parte Republic of Peru,
318 U.S. 578 (1943) 2

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 1, 2

The Santissima Trinidad,
20 U.S. (7 Wheat.) 283 (1822) 2, 3

Saudi Arabia v. Nelson,
507 U.S. 349 (1993) 8

The Schooner Exchange v. M'Faddon,
11 U.S. (7 Cranch) 116 (1812) 2

The Steamship Appam,
243 U.S. 124 (1917) 3

United States v. Alabama,
362 U.S. 602 (1960) 5, 6

United States v. Nordic Village Inc.,
503 U.S. 30 (1992) 9

USX Corp. v. Adriatic Ins. Co.,
345 F.3d 190 (3d Cir. 2003) 12-13

Varity Corp. v. Howe,
516 U.S. 489 (1996) 11

Page

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) ..... *passim*

Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,
336 F.2d 353 (2d Cir. 1964), *cert. denied*, 381 U.S. 394 (1965) 2

Constitutional Provisions and Statutes

United States Constitution:

Article I, section 8, clause 10 9

Eleventh Amendment 5

28 U.S.C. § 1330 4

28 U.S.C. § 1602 *et seq.*, Foreign Sovereign Immunities Act of 1976 ("FSIA") ..... *passim*

28 U.S.C. § 1602 ..... 6, 18

28 U.S.C. § 1604 ..... 4, 16

28 U.S.C. § 1605(a)(3) ..... *passim*

28 U.S.C. § 1605(a)(4) 10, 11

Cited Authorities

Page

Other Authorities

Boyd, John A., Digest of United States Practice in International Law, *Sovereign Immunity Decisions of the Department of State May 1952-January 1977*, Appendix 1018 (Michael Sandler, Detlev F. Vagts and Bruno A. Ristau eds.) (1977) 9

Dep't St. Bull. Vol. XV, No. 384, Nov. 10, 1946 15

Dep't St. Bull. Vol. LXXV, No. 1952, Nov. 22, 1976 18

H.R. Rep. No. 94-1487 (1976), *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 18

Joint Statement between the Governments of the Republic of Austria and the United States, dated January 17, 2001 16

S. Rep. No. 94-1310, 94th Cong., 2d Session (1976) *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 7, 9, 10

Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158, 1959 U.S.T. LEXIS 253 17

Sweeney, Joseph M., *Policy Research Study: The International Law of Sovereign Immunity*, U.S. Dept. of State 1 (1963) 10

INTRODUCTION

Essentially abandoning the Ninth Circuit's grounds for concluding that United States courts have jurisdiction over this action, Respondent ("Altmann") sets yet another course. Altmann has fashioned discordant legal theories expressly rejected by this Court in holdings that she strains to distinguish or references with only the slightest regard for their controlling authority. The entire thrust of her brief is to avoid having the presumption against retrospective application of Congressional enactments apply to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"), on the unfounded assumption that retroactivity must have been what Congress intended in adopting the statute. *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), and its progeny, as well as accepted rules of statutory construction and the FSIA's legislative history, stand firmly against that effort.

I. ALTMANN'S REASONS FOR DEPARTING FROM *LANDGRAF* ARE UNPRECEDENTED AND ILL-CONCEIVED.

1. Altmann's basis for asserting that the FSIA should be presumed to apply retrospectively has been rejected by this Court. Altmann's argument (at 10) that the FSIA, unlike other statutes, is presumptively *retrospective* because it "replaced an earlier federal common law doctrine rather than an earlier statute," conflicts with *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), which was argued with *Landgraf*. Even a statute intended to restate or restore a rule of law cannot be applied retrospectively unless it overcomes the presumption favoring the prospective application of statutes enunciated in *Landgraf*. *Rivers*, 511 U.S. at 313. In so holding, *Rivers* observed that "'[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.'" *Id.* at 311-312 (citation omitted). Ignoring *Rivers*, Altmann cites to *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), a case having nothing to do with the presumption favoring the prospective application of statutes.

Harper confirms that rules of law enunciated by this Court are applied to all cases pending at the time the rule is announced. *Harper*, 509 U.S. at 97-98. *Harper* does not support – and *Rivers* refutes – Altmann's argument (at 10-11) that the FSIA is presumed to apply retrospectively because it purportedly codifies the federal common law of foreign sovereign immunity.

Notably, *Rivers* held that the statute before it, lacking a clear Congressional statement of retrospective application, had an impermissibly retroactive effect "because it creates liabilities that had no legal existence before the Act was passed." *Rivers*, 511 U.S. at 313. In this regard, Altmann's faulty analysis is compounded by her false premise that the FSIA merely codified the common law and did not create new liabilities for foreign states. The "common law" before the FSIA was that foreign states were entitled to absolute immunity at least until 1952, *Berizzi Bros. Co. v. Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); and that expropriations by foreign states of property within their own territory were public acts for which they were immune until the FSIA's enactment in 1976. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 353, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 394 (1965).[1]

1. This Court did not, as Altmann asserts (at 22), "return to the restrictive theory of sovereign immunity" in *Compania Espanola de Navigacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); and *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955). The earliest acknowledgement by the Court of the restrictive theory as "prevailing law" in the United States was in 1976, in reliance on *post-1952* lower court decisions. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703 (1976). Nor, as Altmann asserts (at 20-21), did the Court for 150 years overlook a commercial exception in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) or forget about *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822). To the contrary, the argument that a commercial activity exception can be found in *The Schooner Exchange* was expressly rejected – *over seventy years ago* – in *Berrizi Bros.*, 271 U.S. at 574. And, contrary to Altmann's (Cont'd)

The FSIA departed from the "common law" of foreign sovereign immunity when it enacted the expropriation exception in section 1605(a)(3). *See* Brief for Petitioners, 15-21. Altmann's contention (at 39) to the contrary misreads the only authority it relies upon – *Alfred Dunhill*, a case that did not concern sovereign immunity but, rather, whether the act of state doctrine was a viable defense to a claim for repudiation of a commercial debt. Even so, *Alfred Dunhill* expressly noted that its holding concerning commercial activity *did not apply to* "expropriations of foreign assets located *ab initio* inside a country's territorial borders." *Alfred Dunhill*, 425 U.S. at 697 n. 11.

2. The FSIA is not a forum-allocating statute, as Altmann asserts. Altmann's contention (at 13-14, 30-32) that the FSIA "merely allocate[s] jurisdiction" and addresses "only *where* the suit may be brought, not *whether* a suit may be brought at all," misconstrues this Court's analysis in *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997), disregards the substantive nature of foreign sovereign immunity in the United States and overlooks the express limitations of the FSIA.

Hughes Aircraft rejected the argument advanced by Altmann that jurisdiction-altering statutes are not subject to the presumption against retrospective application. *Hughes Aircraft*, 520 U.S. at 950 ("the only 'presumption' mentioned in [*Landgraf*] is a general presumption *against* retroactivity"). The FSIA speaks not only to the availability of the United States as a forum, as Altmann asserts, but also regulates the substantive immunity of foreign sovereigns and, hence, what claims are available against them in the United States. In *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983), this Court confirmed that the immunity provisions of the FSIA constitute a comprehensive statement of *substantive*, not merely

(Cont'd)
assertions (at 17-23), *The Santissima Trinidad* is inapplicable, as it concerned the preservation of United States neutrality in an *in rem* dispute between *two foreign states* over a prize of war brought *to the United States*. *See The Steamship Appam*, 243 U.S. 124, 153-156 (1917).

procedural, federal law. *Verlinden*, 461 U.S. at 493 ("a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the very outset"). That the FSIA codifies *whether* a suit may be brought in the United States is evident from its text, which confirms that foreign states are presumed to be immune from suit in the United States *unless* one of the statutory exceptions to immunity is established. 28 U.S.C. § 1604; *Verlinden*, 461 U.S. at 488-489. *See also Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995) (plaintiffs bear the initial burden of establishing a statutory exception to immunity).

Had Congress intended to subject all foreign states to United States jurisdiction for every claim for which they could be sued in their own courts – or, indeed, *constrain* the FSIA only to such claims – it would have expressly so provided in the statute. Instead, Congress prescribed jurisdiction over those claims "to which the foreign state is not entitled to immunity under [the FSIA] or any applicable international agreement," 28 U.S.C. § 1330, thus confirming that the FSIA does not merely "speak to the power of the court" to hear claims against foreign states, but also "speaks to the rights and obligations of the parties" in such actions. *Hughes Aircraft*, 520 U.S. at 951 (quoting *Landgraf*, 511 U.S. at 274).

Even if, as Altmann assumes, certain foreign states have waived immunity in their own countries for some causes of action, their substantive immunity in the United States is unaffected. It is well-settled that "'submission of a foreign sovereign to its own courts . . . does not by itself evidence an intent by the foreign sovereign to waive its immunity from suit in the United States.'" *Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 523 (9th Cir. 2001) (favorably quoting the district court) (citations to other circuit courts in accord omitted). *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (a State does not waive

Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts).[2]

There also is no merit to Altmann's contention (at 25) that *Landgraf* is inapplicable because, she asserts, "the FSIA concerns claims to immunity, and not the underlying claim for relief." *Hughes Aircraft* also held that a statute that eliminates a defense previously available to a class of defendants "essentially creates a new cause of action," and would have an impermissible retroactive effect if applied to pre-enactment events, "even though phrased in 'jurisdictional' terms." 520 U.S. at 950-951. *See Abrams v. Société Nationale Des Chemins De Fer Français*, 332 F.3d 173, 183-185 (2d Cir. 2003) (retrospective application of the FSIA "cannot be reconciled with the Supreme Court's discussion of jurisdiction-allocating statutes in *Landgraf* and, more recently, in *Hughes Aircraft*"); *Hwang Geum Joo v. Japan*, 332 F.3d 679, 684 (D.C. Cir. 2003) (the FSIA "'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties'") (quoting *Hughes Aircraft*, 520 U.S. at 951).[3]

---

2. Altmann's attempt (at 31 n. 21) to characterize her approach as one of retroactivity, and not of waiver, is misleading, as the effect is the same – foreign states would be subjected to United States jurisdiction merely because they chose to waive immunity in their own courts.

3. Altmann's reliance (at 14, 35) on *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), and *United States v. Alabama*, 362 U.S. 602 (1960), which she concedes (at 14) involved statutes that "did not alter the pre-existing rights of the parties," is misplaced. *Andrus* held that a statute eliminating the amount-in-controversy requirement for suits against United States agencies could be applied to a pending administrative appeal because prior Congressional intent to permit such suits was undisputed. *Andrus*, 436 U.S. at 608 n. 6, citing to *Ralpho v. Bell*, 569 F.2d 607, 615-616 n. 51 (1977). *See also Califano v. Sanders*, 430 U.S. 99, 101 n. 7 (1977). *Alabama* involved no substantive change in law. The Court merely applied a provision of the 1960 Civil

(Cont'd)

II. ALTMANN'S RESPONSE DISTORTS THE TEXT AND PURPOSE OF THE FSIA.

Altmann's interpretation of the FSIA as containing the requisite Congressional direction for retrospective application is contrary to accepted rules of statutory construction.

1. Altmann's interpretation of the FSIA's preamble does not satisfy Landgraf's clear-statement requirement. *Landgraf* demands an expression of retrospective intent by Congress "so clear it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n. 4 (1997). Altmann argues (at 25) that the phrase "henceforth decided" in the last sentence of the FSIA's preamble, 28 U.S.C. § 1602, mandates that the statute apply to every action commenced after 1976, even if it arises from events that occurred decades previously.

Whether that language is susceptible of Altmann's interpretation is not legally significant. Because Altmann's reading, not a very compelling one, is at best one of several possible interpretations, the *Landgraf* presumption controls. The last sentence in section 1602 on which she relies –

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter

– makes no clear statement that the FSIA applies to all actions commenced on or after the date of enactment. It is at most ambiguous and can be (and repeatedly has been) read instead to

---

(Cont'd)
Rights Act that closed a gap in federal jurisdiction over States under pre-existing law, permitting suits against States in their own names which had previously been litigated under *Ex Parte Young*, 209 U.S. 123 (1908). *Alabama*, 362 U.S. at 604. The civil rights statutes also were injunctive in nature and, as such, applied prospectively under different principles than *Landgraf*. *Id.*, citing to *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921).

apply only to claims *arising after* the effective date. *Hwang Geum Joo*, 332 F.3d at 686 ("[t]he preambular sentence falls far short . . . of stating the 'clear intent' of the Congress that the statute be applied retroactively to events occurring before 1952"); *Abrams*, 332 F.3d at 184 ("[t]he use of the word 'henceforth' can reasonably sustain more than one construction," including prospective intent); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) (noting with approval the district court's holding that the language of the preamble "appeared to be prospective").

That Altmann's construction fails to meet *Landgraf*'s "clear statement" standard is obvious and, on this basis, alone, must be rejected. Her construction also is undermined by the FSIA's legislative history, which indicates that the function of the last sentence was to reflect Congress' intent that determination of sovereign immunity claims should henceforth be decided by the courts, rather than by the Executive Branch, *not* to direct any retrospective application of the FSIA to pre-enactment conduct. *Hwang Geum Joo,* 332 F.3d at 686; S. Rep. No. 94-1310, 94th Cong., 2d Session (1976) ("S. Rep.") at 14, *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 6604, 6613 (the FSIA "sets forth the legal standards under which Federal and State *courts* would henceforth determine all claims of sovereign immunity") (emphasis added). *See also Verlinden,* 461 U.S. at 488.

2. The FSIA regulates post-enactment expropriations by foreign states, not their current possession of property previously expropriated. Dodging the absence of any clear statement by Congress that the FSIA apply retrospectively, Altmann acknowledges (at 24-26, 29) that section 1605(a)(3) focuses on and regulates only "current activities directed toward the United States," but asserts that the regulated conduct is the wrongful current *possession* by foreign states of expropriated property, not their *takings* in violation of international law. Altmann's argument – that what Congress, commentators, and courts have uniformly called the "*expropriation* exception"

applies to foreign states that presently *possess* property taken in violation of international law, no matter when the taking occurred, or by whom – disregards the rudimentary rule of statutory construction that "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch v. Smith*, 538 U.S. 254, __, 123 S. Ct. 1429, 1445 (2003). *See also Lindh*, 521 U.S. at 326 (absent a clear statement by Congress, normal rules of statutory construction should be used to determine whether the statute has an impermissible retroactive effect).[4]

Altmann's argument fails because (a) her construction is contrary to the intent of Congress and the Executive Branch that section 1605(a)(3) applies only to post-enactment takings; (b) the structure of the FSIA, and the plain language of another identically structured immunity exception, are at odds with Altmann's interpretation of the expropriation exception; and (c) Altmann's construction would lead to absurd consequences that could not have been intended by Congress when the FSIA was enacted.

This Court recognized in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), that "Congress had violations of international law by foreign states in mind when it enacted the FSIA. *For example, the FSIA specifically denies foreign states immunity in suits 'in which rights in property taken in violation of international law are in issue.'*" *Amerada Hess*, 488 U.S. at 435 (quoting section 1605(a)(3)) (emphasis added). Indeed, the constitutional basis for the FSIA was, in

4. Altmann's assertion that the expropriation exception also regulates foreign states' commercial activity in the United States *vis-à-vis* the "taken" property (at 33) is unfounded. The commercial activity language identifies the nexus necessary to support the assertion of jurisdiction and is therefore entirely distinct from the essential elements of the immunity exception. *See Saudi Arabia v. Nelson* (Stevens, J. dissenting), 507 U.S. 349, 377 and n. 2 (1993) ("'[t]he nexus rules must be analyzed separately from the substantive immunity rules' . . . because 'the laws regulating . . . jurisdiction . . . and immunity serve different purposes, and thus require different dispositions.'") (citation omitted).

part, Congress' authority under Article I, section 8, clause 10, to "define and punish . . . Offenses against the Law of Nations." *Id.* at 436. *See also* S. Rep. at 14, 5 U.S. Code Cong. & Ad. News (1976) at 6613 (recognizing that sovereign immunity decisions are at "best made by the judiciary on the basis of a statutory regime which incorporates *standards recognized under international law*") (emphasis added).

That Congress "had *violations of international law by foreign states* in mind" when it enacted the expropriation exception, *Amerada Hess*, 488 U.S. at 435 (emphasis added), confirms that Congress and the Executive Branch intended section 1605(a)(3) to regulate post-enactment *takings*, rather than the possession, of property that has a commercial nexus with the United States. No accepted principle of international law makes the *possession* of expropriated property actionable. It is thus no mere coincidence that the statute's legislative history refers to section 1605(a)(3) as the section governing "*Expropriation claims*." S. Rep. at 19, 5 U.S. Code Cong. & Ad. News (1976) at 6618.[5]

Indeed, the State Department, which drafted the FSIA with the Justice Department, reported that the FSIA "denies immunity with respect to *expropriation* claims," noting that, before the FSIA, "*expropriation* was a public act as to which immunity should be accorded." Boyd, John A., Digest of United States Practice in International Law, *Sovereign Immunity Decisions of the Department of State May 1952-January 1977*, Appendix 1018 (Michael Sandler, Detlev F. Vagts and Bruno A. Ristau eds.) (1977) (emphasis added).

5. The 1973 hearing testimony does *not* establish, as Altmann urges (at 28-29 n. 17), that Congress determined that the FSIA should be applied retrospectively. To the contrary, the committee member *and* the State Department's Legal Adviser agreed that the FSIA should *not* be applied retrospectively. Resp. Br. 3a. That no clear statement of the statute's temporal scope was added three years later must be construed, per *Landgraf*, as consistent with Congressional intent that the FSIA should apply only *prospectively*. In any event, "[i]f clarity does not exist [in a statute], it cannot be supplied by a committee report." *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992).

The limited reach of the expropriation exception also is evident when compared with section 1605(a)(4) (the "succession exception"), which has the same grammatical structure. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (a statute "must be given 'as great an internal symmetry and consistency as its words permit'") (citation omitted). Just as the succession exception is framed to afford jurisdiction in cases "in which rights in property in the United States *acquired by succession or gift* . . . are in issue," 28 U.S.C. § 1605(a)(4) (emphasis added), so too the expropriation exception governs cases "in which rights in property *taken in violation of international law* are in issue," 28 U.S.C. § 1605(a)(3) (emphasis added).

Congress intended the succession exception to apply to cases involving rights in property obtained by gift or inherited "*by the foreign state,*" even though, as with the expropriation exception, that qualification is not expressed in the body of section 1605(a)(4). S. Rep. at 20, 5 U.S. Code Cong. & Ad. News (1976) at 6619 (emphasis added). Under Altmann's construction, however, the succession exception would create jurisdiction over any foreign state in possession of property that was, at one time, acquired by succession or gift by another foreign state, or even another person. Congress did not intend such an expansive and illogical construction of section 1605(a)(4), just as it did not intend such a construction of the expropriation exception.[6]

---

6. *Amicus curiae* Bet Tzedek argues (at 6-7) that Austria had no expectation of immunity in 1948 because this case concerns claims over property acquired by inheritance or gift. But the principle, now codified in section 1605(a)(4), is (and always has been) limited to property located in the United States. *See* Sweeney, Joseph M., *Policy Research Study: The International Law of Sovereign Immunity*, U.S. Dept. of State 1, 25 (1963) ("[a] foreign state does not have immunity in actions to determine interests in estates locally administered"). Altmann apparently recognizes this obstacle, as she always avoided reference to section 1605(a)(4) in her Complaint and her submissions to the lower courts. Indeed, she

(Cont'd)

Altmann's proposed statutory construction also runs afoul of the rule that, "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' [the Court] need not apply the language in such a fashion." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Rehnquist, C.J. concurring) (citations omitted). *See also Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

Under Altmann's construction, a federal court may adjudicate claims concerning property expropriated at any time in the past. According to Altmann, any foreign state may be subjected to United States jurisdiction under the expropriation exception, even if it acquired property in its possession as a *bona fide* third party purchaser, so long as a plaintiff sufficiently pleads that, *at some time in history*, the property was taken in violation of international law by another foreign state. Hence, the present-day possession could be innumerable transactions and prior owners removed from the expropriation of the property. *Indeed, the dispute over the rights in the property, under Altmann's construction, need not even be based on the expropriation*. Moreover, according to Altmann and the Ninth Circuit below, the property need not be located in the United States, so long as an agency or instrumentality of the foreign state owns or operates the property and is engaged in "a" commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

(Cont'd)

maintains (at 2 n. 1) that the dispute over Adele Bloch-Bauer's will has nothing to do with the determination of jurisdiction in this case. If, as Bet Tzedek urges, this case is based on rights in inherited property, the case should be dismissed under section 1605(a)(4), since the property is not located in the United States. *See Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) ("'however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment' . . . [especially where] Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions") (citation omitted).

Under Altmann's construction of the statute, the temporal and physical connection to the United States of the underlying harm (*i.e.*, the alleged expropriation) may be so tenuous, as here, as to offend the sense of fairness that every Congressional statute must satisfy, and is plainly beyond what Congress and the Executive Branch intended when the FSIA was enacted.

Under *Landgraf* and its progeny, section 1605(a)(3) may only be applied prospectively to claims based on post-enactment takings in violation of international law, and does not afford jurisdiction in this case based on an alleged taking over twenty-five years before the statute's enactment.

3. The holding in Dole Food v. Patrickson is not relevant to the question before this Court. Altmann's reliance (at 26-30) on this Court's recent ruling in *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655, 1662 (2003), is misplaced. Nothing in *Dole* concerned whether any of the substantive exceptions to immunity in the FSIA may be applied retrospectively. The Court's statement, that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought,'" concerns the *status* of a corporate entity at the time the action is filed, *i.e.*, whether it is an agency or instrumentality of a foreign state under the FSIA. *Dole*, __ U.S. at __, 123 S. Ct. at 1662 (citations omitted).

This understanding of *Dole* is consistent with the recognized two-prong consideration of foreign sovereign immunity under the FSIA, which contemplates a threshold determination of whether the defendant is a foreign state (or agency or instrumentality of one) as defined by the FSIA. *See, e.g., Abrams*, 332 F.3d at 179 ("we turn now to the first of the two issues determinative of the [FSIA's] applicability – [the defendant's] status as a state actor").

Once the defendant's current sovereign status is established, the court turns to whether the plaintiff has established a substantive exception to the statutory presumption favoring immunity. *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 210

(3d Cir. 2003) (distinguishing between the substantive immunity of the foreign state and "the antecedent question we face here, namely, whether the entity comes within the purview of the FSIA at all"); *Gates*, 54 F.3d at 1460 n. 1 ("the threshold question of whether an entity is a foreign state" must be determined before the "courts must determine whether to impute the misdeeds of a government agency to the government itself"); *accord Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989).

The first prong of the test must logically address the status of the party at the time it comes before the Court. The second prong, however, as it is concerned with the *conduct* of the foreign state that gives rise to its defense of sovereign immunity, must address the conduct underlying the cause of action *at the time that conduct occurred*. *Abrams*, 332 F.3d at 180 ("the second question . . . [concerns] whether the Act may be applied to this case even though the underlying events occurred before that statute's enactment"). It is this second prong that addresses what this Court in *Verlinden* identified as "the standards governing sovereign immunity as an aspect of substantive federal law," *Verlinden*, 461 U.S. at 496-497, which was not at all addressed by *Dole*.

III. AUSTRIA HAS NOT WAIVED ITS SOVEREIGN IMMUNITY IN THE UNITED STATES BY ITS COMMITMENTS TO RESTITUTION.

1. Austria's restitution statutes provide no basis to assert jurisdiction in the United States. Altmann and the *amici curiae* who filed in her support acknowledge that Austria's restitution efforts – through nine separate statutes and numerous settlement funds over the last fifty-five years – have been *exclusively* a matter of internal Austrian concern or addressed through diplomatic negotiations with other nations. Prior to this case, no United States court presumed that it could intrude on these efforts by asserting jurisdiction over the Republic of Austria

for a claim for restitution and damages – particularly concerning property located in Austria for over fifty years.[7]

Altmann nonetheless contorts Austria's restitution efforts into a basis for jurisdiction in this case. Altmann's assertion (at 33) that Austria has no expectation of sovereign immunity in the United States because it has provided a forum for expropriation claims in Austria is contrary to the settled rule that a foreign state does not waive immunity in another country merely because it has agreed to the jurisdiction of its own courts. *See supra* at 4.[8]

Not only is Altmann's argument contrary to existing authority, it leads to the absurd result of greater immunity for foreign states that do *not* provide a forum for such claims in their own courts than for those responsible states that do. Governments that make no effort at reparations are more likely, according to Altmann, to enjoy sovereign immunity in the United States for pre-FSIA expropriation claims than foreign states such as Austria, which has enacted numerous restitution statutes since World War II (including the 1998 art restitution statute upon

7. Although Altmann now characterizes her claim as one for replevin (at 3), her eight-count Complaint seeks far more, including claims for disgorgement of profits and compensatory damages of $150 million. J. App. 152a, 207a.

8. Altmann's assertion (at 39) that Austria had no expectation of sovereign immunity in 1948 because it had adopted a restrictive theory of sovereign immunity also is unfounded, as explained in the Brief for Petitioners (at 30). However, even if Austria's adoption of a more restrictive theory has any relevance here, and it does not, Altmann's reliance on the Austrian Supreme Court's decision in *Dralle v. Republic of Czechoslovakia*, 17 Int'l L. Rep. 155 (1950), is misplaced. *Dralle* held that a neutral state need not recognize the conduct of one belligerent state over property of another *that is located within the neutral's borders*. *Id.* at 165. Because the intellectual property in *Dralle* was registered in the Austrian Register, and therefore *located in Austria*, *Dralle* has no relevance to the pre-FSIA absolute immunity accorded to foreign states in the United States for expropriations of property *located within their own borders*.

which Altmann relies), and has entered into international agreements to facilitate such claims. No conceivable policy or logic supports such a result.

2. Austria did not waive its sovereign immunity in the United States by entering into treaties, international agreements or conventions. Altmann's assertion that Austria could not expect immunity in 1948 because it entered into treaties, international agreements and conventions that concerned restitution to Nazi victims also disregards established precedent identified in the Brief for Petitioners (at 28-29).[9]

International treaties, agreements or conventions do not create private rights of action against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction. *Amerada Hess*, 488 U.S. at 442. The recognition by all members of the international community, including Austria, that properties looted by Nazi Germany should, where possible, be returned to their rightful owners is not in dispute here. The numerous treaties, agreements, declarations and conventions made during and after World War

9. Austria's sovereignty in 1948 is beyond dispute, contrary to the assertion of *amici curiae* the Austrian Jewish Community and the American Jewish Congress (collectively, "AJC") (at 27). Recognition of a foreign sovereign is entirely a matter for the Executive Branch and beyond the competence of the courts to question. *National City Bank*, 348 U.S. at 358. The Executive Branch has consistently maintained from the time of World War II that Austria retained its sovereign status during the war and the subsequent Allied occupation, even though it had no recognized government from 1938 until its new government was recognized in 1946. Dep't St. Bull. Vol. XV, No. 384, 864, Nov. 10, 1946. Altmann does not contend otherwise and explicitly agrees (at 4-5) that the United States formally recognized Austria's sovereignty no later than 1946, and that Austria was "a foreign state then occupied militarily by the United States and its Allies." *See also* Brief for Petitioners at 34. Even assuming *arguendo* and contrary to fact that Austria's sovereignty was not recognized until 1955, as AJC asserts, the recognition validates all conduct of the Austrian post-war government after 1945. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

II to that effect do not, however, constitute a waiver of sovereign immunity in the United States by their signatories or participants, any more than the United States waived its immunity to suit in other nations by entering into these agreements. To the contrary, they embody the universally held principle that these issues should, and are, resolved through diplomatic channels rather than through private rights of action.[10]

Nor is there any merit to the assertion by *amici curiae* AJC (at 20-27) that the "Bernstein Letter" and its "antecedents and progeny" created an exception to sovereign immunity for Holocaust-related claims. That the term, "act of state," does not appear in the Bernstein Letter is no basis, as AJC asserts (at 23), to apply it any more broadly, fifty years later, than its original purpose. The Bernstein Letter has been uniformly

10. Altmann's assertion (at 33) that Austria "did not rely on immunity" is misleading, as it wrongly presupposes that an act or statement of reliance is required for sovereign immunity to attach. To the contrary, sovereign immunity automatically applies under the FSIA unless one of the specific exceptions to immunity is established by the plaintiff. 28 U.S.C. § 1604; *Verlinden*, 461 U.S. at 488. Altmann's suggestion (at 7, 34) that the Joint Statement of January 17, 2001 between Austria and the United States is somehow inconsistent with Austria's assertion of immunity here is particularly inaccurate. The suggestion that the absence of an express reservation by Austria in the Joint Statement of its sovereign immunity in this action raises any implication of waiver (or other significance under the FSIA) is nonsense. The Joint Statement expressly states that claims for restitution of works of art are not settled under that agreement and are to proceed pursuant to the Austrian Federal Law of December 4, 1998 ("Austrian Art Act"), which created the Advisory Board that reviewed and rejected Altmann's claims. Joint Statement, 2001 U.S.T. LEXIS 34, *29-30. *See also* Appendix *infra* at 1a. Altmann also misstates (at 34) the import of the letter from Mr. Winkler of the Austrian Federal Ministry for Foreign Affairs. The letter (at J. App. L) merely confirms Austria's understanding of the Joint Statement to which it refers – that art restitution claims are not settled under the Joint Statement and that this case, like other claims pertaining to art restitution, "is a matter of art restitution under the *Austrian law* [referring to the Austrian Art Act]." (Emphasis added).

recognized as speaking *solely* to the act of state doctrine. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) ("where the Executive Branch . . . expressly represents to the Court that application *of the act of state doctrine* would not advance the interests of American foreign policy, *that doctrine* should not be applied by the courts") (emphasis added). Neither the Bernstein Letter nor the policy reflected in it have ever been adopted as an exception to sovereign immunity, either by the Executive Branch or the Court.[11]

3. Altmann's attempt to belittle the foreign policy implications of this case are unpersuasive. The interests of the United States in the question before the Court are well-stated in the Government's *Amicus Curiae* Brief, and need no repetition here. That the United States appeared as *amicus curiae* before the Ninth Circuit and this Court, rather than through a Statement of Interest, is entirely appropriate. Indeed, when the FSIA was first enacted, the State Department announced that it would participate "in cases of significant interest to the Government"

11. Important aspects of other documents were not addressed in AJC's brief, including that (1) the Allied Powers agreed in the London Declaration that restitution of Nazi-looted property would be made by the legitimate post-war government of the territory in which the property is located (Br. App. 11a;) (2) the 1921 and 1919 Treaties are not only irrelevant, as they facially apply only to "international trade" and not to expropriations of property located within Austria's territory, they do not create any private rights of action against Austria in the United States, *see, e.g.*, *Columbia Marine Services, Inc. v. Reffet, Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) ("[an] action arises under a treaty only when the treaty expressly or by implication provides for a private right of action. The treaty must be self-executing; *i.e.*, it must prescribe rules by which private rights may be determined"); (3) the statement by the United States Secretary of State that Austria could not expect to "prevent private persons from advancing [restitution] claims" in fact continued with the Secretary's assurance that, "the United States would not support any such action after a satisfactory [diplomatic] settlement was reached." AJC Br. App. 47a. (A diplomatic settlement *was* reached, on May 22, 1959. *Settlement of Certain Claims Under Article 26 of the Austrian State Treaty*, 10 U.S.T. 1158, 1959 U.S.T. LEXIS 253.)

by "appearing as an *amicus curiae*" before the appellate courts, as it has done in this case. Dep't St. Bull. Vol. LXXV, No. 1952, Nov. 22, 1976 ("[i]f a court should misconstrue the new statute, the United States may well have an interest in making its views known to an appellate court").

The suggestion advanced by Altmann (at 42-43) that the interests of foreign states are protected, not by applying *Landgraf* to the FSIA, but, rather, by the Executive Branch filing Statements of Interest whenever it believes that retrospective application of the FSIA would adversely affect foreign relations, is contrary to a principal purpose of the FSIA, which was to release the Executive Branch from the embarrassing practice of filing (and being asked to file) case-specific statements that inevitably complicate intercourse with foreign nations. Altmann's argument also would compel courts to repeatedly turn to the Executive Branch for guidance in individual cases, contrary to the purpose of the FSIA that, henceforth, all determinations of immunity should be decided by the courts. 28 U.S.C. § 1602. *See also* Dep't St. Bull. Vol. LXXV, No. 1952, Nov. 22, 1976 ("it would be inconsistent with the legislative intent of the [FSIA] for the Executive Branch to file any suggestion of immunity on or after [the effective date of the FSIA]"); *Verlinden*, 461 U.S. at 488 ("Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process'") (quoting from H.R. Rep. No. 94-1487, p. 7 (1976), *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 6604).

That Austria's restitution to Nazi victims has provoked strong emotional responses for three generations, within and outside Austria, cannot be disputed. Neither those responses nor the history that gives rise to them, however, provide justification for expanding United States jurisdiction well beyond what the Executive Branch and Congress intended when

they drafted and enacted the FSIA, nor for betraying fundamental legal doctrines recognized by this Court since the beginning of this nation.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court reverse the opinion below and remand with instructions to dismiss the action in its entirety for lack of subject matter and personal jurisdiction.

Respectfully submitted,

SCOTT P. COOPER*
CHARLES S. SIMS
JONATHAN E. RICH
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067
(310) 557-2900

Attorneys for Petitioners

* *Counsel of Record*

APPENDIX

EXCERPT OF ANNEX A TO JOINT STATEMENT BETWEEN THE GOVERNMENTS OF THE REPUBLIC OF AUSTRIA AND THE UNITED STATES, DATED JANUARY 17, 2001*

* * *

5. *Restitution of Works of Art*: Art restitution will proceed on an expedited basis pursuant to the Federal Law of December 4, 1998 concerning the works of art from the Austrian Federal Museums and Collections. The Austrian Federal Government will undertake its best efforts to address the issue of the return of the works of art from Austrian companies and Austrian public entities not covered by the Federal Law. The Austrian Federal Government will undertake its best efforts to encourage the adoption of similar procedures at the municipal and provincial levels. To this end, the Austrian Federal Chancellor will write a letter to governors and mayors urging them to adopt such measures, recalling the resolution by the Austrian Parliament of 1998 urging provincial and municipal museums to research the provenance of the art works in their possession and to return all such art looted during the National Socialist era to the rightful owners.

* * * *

---

* Source, 2001 U.S.T. LEXIS 34, *29-30.